92-563

Supreme Court, U.S.
FILED
SEP 28 1992
OFFICE OF THE CLERK

CASE NUMBER _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1992

CLIFFORD HELTON AND CHARLES POWERS

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

L. P. SUTLEY
Counsel of Record
Murchison and Sutley
Attorneys at Law
P. O. Drawer 1320
Foley, Al 36536
(205) 943-1579

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE STATUTORY SCHEME OF 21 U.S.C. SECTION 841(b) WHICH EQUATES ONE MARIJUANA PLANT WITH ONE KILOGRAM OF MARIJUANA AND THE CORRESPONDING SECTION OF THE UNITED STATES SENTENCING GUIDELINES (U.S.S.G. SECTION 2D1.1 ET SEQ) IS WITHOUT RATIONAL BASIS AND DENIES THE PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE UNITED STATES CONSTITUTION?

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I. TITLE 21 SECTION 841(b) AND THE CORRESPONDING SECTION OF THE SENTENCING GUIDELINES HAVE NO CONSTITUTIONALLY RATIONAL BASIS TO SUPPORT THEIR LANGUAGE AS TO MANUFACTURERS (GROWERS) OF

MARIJUANA. CONGRESS IS AUTHORIZED TO CREATE A STATUTORY SCHEME PREDICATED ON THE PROPOSITION THAT THE GREATER THE WEIGHT OF AN ILLICIT DRUG THE GREATER THE SENTENCE. CONGRESS DEPARTED FROM THAT SCHEME ONLY AS TO MANUFACTURERS (GROWERS) OF MARIJUANA BY IMPUTING SUBSTANTIALLY MORE WEIGHT FOR MARIJUANA GROWING PLANTS WHICH BEARS NO RELATIONSHIP TO ACTUAL WEIGHT OF GROWING MARIJUANA PLANTS OR THE OFFENSE CONDUCT. THE RESULT CREATES A FALSE DISTINCTION NOT TEXTUALLY MENTIONED IN THE STATUTE BETWEEN MANUFACTURERS (GROWERS) AND DISTRIBUTORS APPLICABLE ONLY TO MARIJUANA OFFENSES. NO OTHER

MANUFACTURER OF ANY DRUG, EVEN THOSE MORE DANGEROUS THAN MARIJUANA, (I.E. HEROIN OR COCAINE), IS TREATED MORE HARSHLY. THE FALSE DISTINCTION BETWEEN MANUFACTURERS (GROWERS) AND DISTRIBUTORS OF ONLY MARIJUANA UNFAIRLY IMPACTS THE LIBERTY OF A SIGNIFICANT NUMBER OF DEFENDANTS IF THEY ARE ARRESTED PRIOR TO HARVEST AS WAS PETITIONER, EVEN THOUGH IT HAS NO EFFECT ON MANUFACTURERS A R R E S T E D A F T E R HARVEST.....

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REPORT OF OPINION OF ELEVENTH CIRCUIT

The opinion of the United States Court of Appeals for the Eleventh Circuit is not reported, however, Appellant's Appeal was denied, and the Defendants' conviction affirmed on the 24th day of June, 1992.

SUPREME COURT JURISDICTION

The decision of the district court is due to be reviewed and jurisdiction is conferred upon the Supreme Court by 28 U.S.C. Section 1254(1).

STATUTES INVOLVED IN THE CASE

I. Title 21, Section 841(b) of the United States Code states in pertinent part:

Penalties

(b) Except as otherwise provided ... any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight;

such person shall be sentenced to a term of imprisonment which may not be

less than 10 years or more than life . . . .

(B) In the case of a violation of subsection (a) of this section involving--

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years ....

(C) In the case of a controlled substance in Schedule I or II except as provided in subparagraphs A, B and D, such person shall be sentenced to a term of imprisonment of not more than 20 years....

(D) In the case of less than 50 kilograms of marijuana, except in the case of 50 or more marijuana plants regardless of weight such person

> shall ... be sentenced to a term of imprisonment of not more than 5 years....
>
> Sentencing Guidelines, Part D - Offenses Involving Drugs, Section 2D1.1 (footnote):

In the case of an offense involving marijuana plants, if the offense involved (A) 50 or more marijuana plants, treat each plant as equivalent to 1 KG of marijuana; (B) fewer than 50 marijuana plants, treat each plant as equivalent to 100 G of marijuana. **Provided**, however, that if the actual weight of the marijuana is greater, use the actual weight of the marijuana. U.S.S.G. Section 2D1.1, p. 73 (West Ed. 1991).

Sentencing Guidelines, Part D - Offenses Involving Drugs

STATEMENT OF THE CASE

A. BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The Defendant, Helton, and his co-defendant, Powers, were arrested while walking down a sandy lane after an agent with the Federal Wildlife Service had observed Powers in the area of the marijuana plot and overheard them talking on a Federal Wildlife Refuge. They were charged with possession of marijuana with intent to distribute in violation of 21 U.S.C. Section 841. The Defendants were convicted in a jury trial, and Helton received ninety-two months sentence and the co-defendant Powers was likewise convicted and received sixty-three months.

B. STATEMENT OF FACTS

Prior to their sentencing, The Defendants filed a motion challenging the sentencing scheme under 21 U.S.C. 841 and the corresponding section of the Sentencing Guidelines (Section 2D1.1). After finding the Defendants guilty, the District Court held an evidentiary hearing to determine whether the sentencing provisions embodied in Section 841 was the appropriate method or violated due process rights of the Defendant. Defendants' attorneys cited numerous cases including the case of United States v. Osburn wherein the District Court in the Northern District of Georgia found "no rational basis to support the Commission's 1000 grams per plant ratio for plants in groups of 50 or

more. The evidence in that case clearly demonstrates that a 1,000 gram equivalency cannot be empirically supported by saying "(T)he Court finds that the guidelines drug quantity table is unconstitutional to the extent that it treats one plant as equivalent to 1000 grams."

United States v. Osburn, 756 F. Supp. 571 (N.D. Ga. 1991).

The Appellants hereby request that the Appellants' Request for Certiorari to the Supreme Court be joined with that in the request of George Nye Osburn v. United States of America, Petition for Writ of Certiorari, Case No. 92-5074 received on June 22, 1992 by the Clerk of the Supreme Court of the United States as the issues are identical, and hereby adopts the arguments contained therein.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. TITLE 21 SECTION 841(b) AND THE CORRESPONDING SECTION OF THE SENTENCING GUIDELINES HAVE NO CONSTITUTIONALLY RATIONAL BASIS TO SUPPORT THEIR LANGUAGE AS TO MANUFACTURERS (GROWERS) OF MARIJUANA. CONGRESS IS AUTHORIZED TO CREATE A STATUTORY SCHEME PREDICATED ON THE PROPOSITION THAT THE GREATER THE WEIGHT OF AN ILLICIT DRUG THE GREATER THE SENTENCE. CONGRESS DEPARTED FROM THAT SCHEME ONLY AS TO MANUFACTURERS (GROWERS) OF MARIJUANA BY IMPUTING SUBSTANTIALLY MORE WEIGHT FOR MARIJUANA GROWING PLANTS WHICH BEARS NO RELATIONSHIP TO ACTUAL WEIGHT OF GROWING MARIJUANA PLANTS OR THE OFFENSE CONDUCT. THE RESULT CREATES A FALSE DISTINCTION NOT TEXTUALLY MENTIONED

IN THE STATUTE BETWEEN MANUFACTURERS (GROWERS) AND DISTRIBUTORS APPLICABLE ONLY TO MARIJUANA OFFENSES. NO OTHER MANUFACTURER OF ANY DRUG, EVEN THOSE CONSIDERED FAR MORE DANGEROUS THAN MARIJUANA, (I.E., HEROIN OR COCAINE), IS TREATED MORE HARSHLY. THE FALSE DISTINCTION BETWEEN MANUFACTURERS (GROWERS) AND DISTRIBUTORS OF ONLY MARIJUANA UNFAIRLY IMPACTS THE LIBERTY OF A SIGNIFICANT NUMBER OF DEFENDANTS IF THEY ARE ARRESTED PRIOR TO HARVEST AS WAS PETITIONER, EVEN THOUGH IT HAS NO EFFECT ON MANUFACTURERS ARRESTED AFTER HARVEST.

A. THE STATUTORY AND SENTENCING GUIDELINE BACKGROUND

The Eleventh Circuit Court of Appeals correctly described the statute in question and the relevant portions of the

federal sentencing guidelines in its opinion in Osburn v. United States, 955 F.2d 1500, 1504 (11th Cir. 1992) and it is applicable to these Defendants as well.

II. THE STATUTE AND THE FEDERAL SENTENCING GUIDELINES

Defendants were convicted and sentenced pursuant to 21 U.S.C. Section 841.[1] In that statute, Congress outlined

[1] Section 841(b) provides:

> (1)(A) In the case of a violation of subsection (s) of this section involving -
> (vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life...

> (B) In the case of a violation of subsection (a) of this section involving -
> (vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana, or 100 or more

a sentencing scheme in which an individual's sentence would increase in proportion to the number of plants seized or in proportion to the actual weight of dried marijuana involved in the conviction. In offenses involving the seizure of 50 or more marijuana plants, Congress provided a plant/weight equivalency scheme in which one plant

---

> marihuana plants regardless of weight
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years....
>
> (C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B) and (D), such person shall be sentenced to a term of imprisonment of not more than 30 years....
>
> (D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight such person shall be sentenced to term of imprisonment ... of not more than 5 years....

would be equated with 1000 grams of marijuana. In instances involving fewer than 50 plants, the actual weight of marijuana attributable to the seized plant would be used when calculating the defendant's sentence.

In Section 841(b), Congress established sentencing ranges based on the actual quantity of dry marijuana seized or the "equivalent" number of plants. If the conviction involves 1000 kilograms or more of marijuana, or 1000 or more marijuana plants, the defendant will receive a sentence of no less than ten years and no greater than life imprisonment. An offense involving 100 or more kilograms of marijuana or 100 or more plants requires a minimum sentence of five years and a maximum of forty years imprisonment. A defendant convicted of an

offense involving 50 or more kilograms of marijuana or 50 or more plants will be subject to a maximum sentence of twenty years. An offense involving fewer than 50 kilograms of marijuana or fewer than 50 plants warrants a sentence of not more than five years.

The Federal Sentencing Guidelines echo the Congressional equivalency scheme contained in Section 841(b):

> In the case of an offense involving marijuana plants, if the offense involved (A) 50 or more marihuana plants, treat each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants, treat each plant as equivalent to 100 G of marihuana. Provided, however, that if the actual weight of the

marihuana is greater, use the actual weight of the marihuana. U.S.S.G. Section 2D1.1, p. 82 (Nov. 1991).

Although the statute indicates that sentencing for offenders convicted of possessing fewer than 50 plants is to be based on the actual weight, the Guidelines apply a 100 gram per se equivalency unless the actual weight is higher. The Commission justifies this ratio by "the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana." U.S.S.G. Section 2D1.1, p. 89 (Nov. 1991) (commentary following Guideline).

United States v. Osburn, ibid.

The general statutory scheme for marijuana is the same as it is for all

drugs under Section 841 of Title 21. The greater the actual weight, the greater the penalty.

The Sentencing Guidelines follow this scheme. Since the statute provides direction only for the more common controlled substances (heroin, cocaine, marihuana, etc.) The DRUG EQUIVALENCY TABLE provides conversion factors for other substances. There is no conversion for plants, however.

Although the statute does provide a false "equivalency" for marijuana plants of 1000 grams (kilogram), there is no similar equivalency for any other plant, even though there are other illicit drugs which originate from plants, (i.e., heroin, cocaine and peyote). Manufacturers of cocaine, heroin or peyote are all considered more dangerous drugs

than marijuana, are treated the same as distributors of those drugs; the greater the actual weight, the harsher the sentence.

The concepts of equal protection and Due Process do not require that all persons be dealt with identically. However, there must be some "rational" basis for the statutory distinctions which congress makes, or they must have "some relevance to the purpose for which the classification is made." Marshall v. United States, 414 U.S. 417, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974). Johnson v. Robinson, 415 U.S. 361, 39 L.Ed.2d 387, 94 S.Ct. 1160 (1974).

An apt analogy of the absurdity of the Sentencing provision here in question would be to propose to pass a statute allowing the government to convict its

citizens of the theft of goods when the victim never possessed or owned the goods as they were not in existence, and more significantly, may never have come into existence. This case is not a conspiracy, but rather the substantive offense of actual possession, even though the res does not exist.

Both in Osburn and U.S. v. Lee, 762 F.Supp 306 (P. Kansas 1991), trial courts judicially determined that equating one marijuana plant with one kilogram of marijuana is not rational, for the reason that it is impossible for one plant to ever produce one kilogram of marijuana.

The Lee court determined that there was no rational basis for selection of the number of plants as the basis for the enhanced sentence. Having found no rational basis, it concluded that the

application of 2d 1.1 was an arbitrary selection that likewise offended the constitutional mandate of equal protection as provided in the 14th Amendment. One Court found "rationality" in the statutory scheme by reasoning that to adopt weight as the sole measure for punishment would reward defendants for being arrested early in the growing cycle of their enterprise. See U.S. v. Graham, 710 F.Supp. 1290 (N.D. Cal. 1989). The Eleventh Circuit Court of Appeals adopted a similar result in the Osburn case. However, the converse can be argued with perhaps even more "rationality". A defendant who is sophisticated enough in his unlawful activities to avoid apprehension, which we know most are, until after his marijuana plants have been harvested and processed into their final market weight and form is

rewarded by the law when he finds himself, because of that activity, in the lower levels of the sentencing structure. On the other hand, a person who is caught at a much earlier stage of his unlawful activity, before the plants are harvested, receives a greater sentence than he would have received had he been caught much later in the process. Clearly, there is nothing rational in rewarding defendants who are capable of proceeding further through their unlawful plans than those defendants, who through inexperience or simple bad luck, are apprehended with a crop of marijuana plants that just sprouted roots. This sort of injustice is greater to the converse injustice rationalized by the Court in Graham, supra.

We know that penalties for drug

offenses need not reflect individual degrees of culpability. Chapman v. United States, 500 U.S. _____, 111 S.Ct. 1919, 1928 (1991). However, that does not mean that such penalties can be irrational, and at the same time treat one class of defendants significantly different than others who have violated the same statute. Ibid.

The Sentencing Commission concedes that a marijuana plant is not close to the equivalent of a kilogram, but rather "the average yield from a mature marihuana plant equals 100 grams of marihuana." U.S.S.G. Section 2D1.1, p.89 (Nov. 1991) (commentary following Guideline). This conclusion is supported by the expert testimony in the Osburn case, ibid. Dr. ElSohly, a government employed expert, testified that a reasonable figure was 120

grams or 4 ounces. He also testified that the 100 gram/plant ratio was reasonable and that the 1000 gram/plant ratio was unreasonable. (Pages 38-39 of district court testimony).

Of all the drugs in the "Drug Table," marijuana plants are the only drug where Congress has not used an approximate weight equivalency and where it has treated a manufacturer more harshly than a distributor. Congress apparently chose a weight on the assumption it would approximate the weight of a marijuana plant and to avoid precise calculations in every case. Unfortunately, the weight chosen has no rational basis. Congress has singled out possession of marijuana plants for harsh treatment through the use of an alleged equivalency which is false, yet uses approximate weights for every

other drug. There is no indication that this harsh treatment of manufacturers of marijuana was intentional when compared to manufacturers of heroin or cocaine.

C. THE ELEVENTH CIRCUIT DECISION IS ERRONEOUS

Why Congress felt it necessary to single out marijuana growers for such harsh punishment that does not relate to actual weights when it has not taken similar action for the manufacturers of any other drug, including those more dangerous and included within the same statutory prohibitions.

It is well known and accepted that both cocaine and heroin are considered more dangerous by Congress and the Sentencing Commission. The Sentencing Commission's Drug Equivalency Table treats 1 gm of Marihuana/Cannabis as the

equivalent of 1 milligram of heroin and treats 1 gram of cocaine as the equivalent of .2 grams of heroin indicating the relative seriousness with which each is viewed. U.S.S.G. Section 2D1.1 (Drug Equivalency Table).

It is reasonable to single out drugs for harsher punishment because of properties inherent in their makeup. United States v. Buckner, 894 F.2d 975 (8th Cir. 1990); United States v. Shaw, 936 F.2d 412 (9th Cir. 1991).

Yet, Congress has done nothing to single out manufacturers of cocaine (or of crack), or heroin for more harsh treatment than possession of growing marijuana.

In its opinion in Osburn,, the Eleventh Circuit conceded that its assumption, that Congress chose to treat growers of marijuana plants more harshly,

had a flaw--an "anomaly" as the Court put it:

> Defendants correctly identify an anomaly in the statutory scheme. Under section 841(b), a grower who is arrested immediately after she has harvested her marijuana crop will be sentenced according to the weight of the marijuana yielded by that crop. From the testimony before the district court, we are aware that the average yield on the crop could not even approach the 1000-gram-per-plant level. Yet, a similar situated grower, arrested immediately prior to harvesting his crop will be sentenced on a 1000-gram-per-plant basis. In this example, two people, almost identically situated, will be treated in an appreciably different manner. From the viewpoint of Congress, there seems to be no way to differentiate between the conduct of the two offenders. United States v. Osburn, 955 F.2d 1500, 1509.

The Eleventh Circuit conceded the scheme was flawed, and these defendants have shown that the inequity has resulted from this potential loophole.

The harshness of the statute as to marijuana growers is not rational in light of the way Congress has treated other drugs. Congress may have simply chosen a suggested weight and assumed it was an approximate weight. It is not.

The Appellants were sentenced under an unconstitutional and arbitrary criteria. This Honorable Court in Ex Parte Siebold, 100 U.S. 371, 25 L.3d. 717 (1879) held that when proceedings are held under an unconstitutional act or law they are void,not merely erroneous.

The Constitution requires that if citizens of this country are charged and convicted of some offense and are to be treated differently, there must be some rational basis for the difference. Since it is not rational to equate one marijuana plant with one kilogram of marijuana, for

the reason that, in the real world, one marijuana plant simply cannot produce one kilogram of marijuana and one hundred plants cannot be equated with one hundred kilograms of marijuana, ever, the 50 plant cut off for weight imputation and sentence enhancement creates, since Lee, supra and Streeter, supra, three distinct possible sentences for those similarly charged and convicted under Section 841(a)(1): (1) Sentencing under 2D 1.1 attributing 100 grams per plant; (2) Sentencing under 2D 1.1 using 300 grams per plant; and (3) Sentencing under 2D 1.1 using 1000 grams per plant. The Defendant should have been sentenced under the Guidelines in accordance with their possession of 2.6 kilograms, 5 pounds 11 ounces) weight of marijuana. (Sentencing Transcript, p.43). The sentence of the Defendants is due to

be reversed and remanded with instructions.

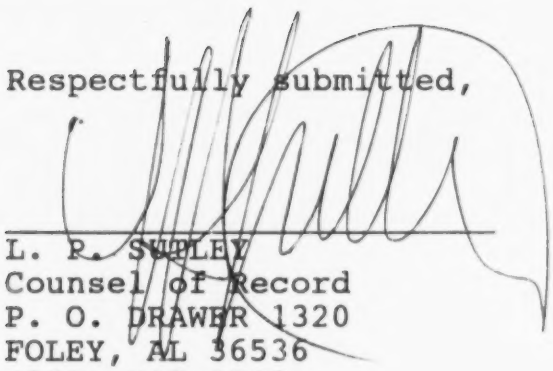
CONCLUSION

Title 21 Section 841(b) and the corresponding section of the sentencing guidelines have no rational basis to support their language as to manufacturers of marijuana. Congress created a statutory scheme predicated on the simple proposition that the greater the weight of an illicit drug the greater the sentence. Congress departed from that scheme only as to manufacturers of marijuana by substantially overstating the weight for marijuana plants which bears no relationship to the actual weight of marijuana plants.

The result unintentionally creates a false distinction not textually mentioned in the statute between manufacturers and distributors but applicable only to marijuana offenses. No other manufacturer

of any drug, even those considered far more dangerous than marijuana, such as heroin or cocaine, is treated more harshly than distributors of that drug. The statute carries an unintended distinction between manufacturers and distributors of only marijuana and unfairly impacts the liberty of a significant number of defendants convicted of manufacturing marijuana if they are arrested prior to harvest as was petitioner. Furthermore, the statute has no effect on manufacturers arrested after harvest who are treated as distributors. This scheme violates petitioner's right to due process and equal protection of the laws under the Fifth Amendment to the United States Constitution and the convictions of the Defendants are due to be reversed and remanded with instructions.

Respectfully submitted,

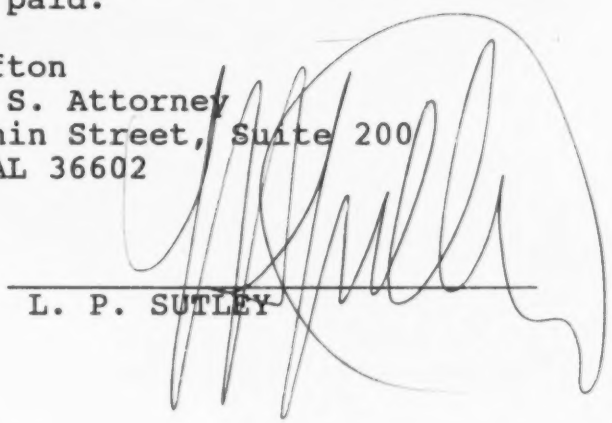


L. P. SUTLEY
Counsel of Record
P. O. DRAWER 1320
FOLEY, AL 36536
(205) 943-1579

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of September, 1992, I served a copy of the foregoing Petition for Writ of Certiorari on the following parties by placing the same in the United States mail, postage paid:

Rusty Lofton
Asst. U. S. Attorney
169 Dauphin Street, Suite 200
Mobile, AL 36602



L. P. SUTLEY

APPENDIX

UNITED STATES DISTRICT COURT
Southern District of Alabama

UNITED STATES OF AMERICA,

v.

CHARLES WINFRED POWERS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Case Number: 90-00085

Laurence Sutley, Defendant's Attorney

THE DEFENDANT:

was found guilty on Count One of the indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section 21: 841(a)(1)

Nature of Offense Possession with intent to distribute marijuana

Date Offense Concluded June 16, 1990

Count Number One

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

XX It is ordered that the defendant shall pay a special assessment of $50.00 for Count(s) One of the Indictment, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until al fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 263-66-9460

Defendant's Date of Birth: 4-19-43

Defendant's Mailing Address: In custody

Defendant's Residence Address: In custody

February 20, 1991
Date of Imposition of Sentence

_____
Signature of Judicial Officer

Richard W. Vollmer, Jr.
United States District Judge
Name & Title of Judicial Officer

February 20, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty-three (63) months.

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE

JUDGMENT ENTRY NO. 632
JOHN V. O'BRIEN
BY:
DEPUTY CLERK

xThe court makes the following recommendations to the Bureau of Prisons:

that the defendant serve the term of imprisonment imposed by this Court in a facility capable of the standard of care required to meet this defendant's medical needs.

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years.

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

UNITED STATES DISTRICT COURT
Southern District of Alabama

UNITED STATES OF AMERICA,

v.

CLIFFORD HELTON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Case Number: 90-00085

James May, Defendant's Attorney

THE DEFENDANT:

was found guilty on Count One of the indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section 21: 841(a)(1)

Nature of Offense Possession with intent to distribute marijuana

Date Offense Concluded June 16, 1990

Count Number One

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

XX It is ordered that the defendant shall pay a special assessment of $50.00 for Count(s) One of the Indictment, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until al fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 262-30-2121

Defendant's Date of Birth: 10-11-27

Defendant's Mailing Address: In custody

Defendant's Residence Address: In custody

February 20, 1991
Date of Imposition of Sentence

_____
Signature of Judicial Officer

Richard W. Vollmer, Jr.
United States District Judge
Name & Title of Judicial Officer

February 20, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ninety-two (92) months.

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE

JUDGMENT ENTRY NO. 632
JOHN V. O'BRIEN
BY:
DEPUTY CLERK

xThe court makes the following recommendations to the Bureau of Prisons:

that the defendant serve the term of imprisonment imposed by this Court in a facility capable of the standard of care required to meet this defendant's medical needs.

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years.

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-7195
Non-Argument Calendar

D. C. Docket No. CR90-00085-RV

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES WINFRED POWERS and
CLIFFORD HELTON,

Defendants-Appellants.

Appeals from the United States District Court
For the Southern District of Alabama

(June 24, 1992)

Before HATCHETT, EDMONDSON and COX, Circuit Judges.
PER CURIAM:

Affirmed. See Circuit Rule 36-1.

Judgment Entered: June 24, 1992

For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: July 16, 1992

(2)

No. 92-563

FILED
DEC. 15 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

CLIFFORD HELTON AND CHARLES POWERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether 21 U.S.C. 841(b)(1)(B)(vii) and its implementing Sentencing Guidelines provision violate the Due Process Clause because, for sentencing purposes, they equate possession of 50 or more marijuana plants to possession of an equivalent number of kilograms of marijuana.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-563

CLIFFORD HELTON AND CHARLES POWERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 37-38) is unpublished, but the judgment is noted at 966 F.2d 1461 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1992. The petition for a writ of certiorari was filed on September 28, 1992, and is therefore out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Alabama, petitioners were convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Powers was sentenced to 63 months' imprisonment, to be followed by four years' supervised release. Petitioner Helton was sentenced to 92 months' imprisonment, to be followed by four years' supervised release. The court of appeals affirmed. Pet. App. 37-38.

1. On June 12, 1990, employees of the Bon Secour National Wildlife Refuge in Alabama discovered a patch of 69 marijuana plants growing in a section of the refuge. The plants were well maintained. They were planted in potting soil, surrounded by mulch, and protected by rat poison; moreover, watering holes and irrigation ditches had been dug nearby. A trail from that marijuana patch led to other patches containing more than 200 additional marijuana plants, similarly well maintained. Agents of the United States Fish and Wildlife Service (FWS), which has jurisdiction over the refuge, undertook surveillance of the marijuana patches. Presentence Report 1-2; Sentencing Tr. 36, 38, 40, 42.

On June 16, 1990, the FWS agents saw petitioners drive up to one of the marijuana patches in a red pickup truck. Petitioners got out of the truck and walked over to one of the patches. Petitioner Helton told petitioner Powers that "the leaves were yellow and * * * [w]e need to pour the water and the fertilizer to [them]." Gov't C.A. Br. 5 (quoting 3 R. 193).

Petitioner Powers then started watering the marijuana plants. *Ibid.*

About two hours later, FWS agents arrested petitioners as they attempted to leave the area. Subsequently, petitioners were each indicted and convicted by a jury of violating 21 U.S.C. 841(a)(1). Gov't C.A. Br. 2, 5.

2. At sentencing, the district court found that each petitioner's offense of conviction involved the possession of 272 marijuana plants. Sentencing Tr. 42. Based on that finding, the court determined that the total offense level for each petitioner was 26. That determination was based on Section 2D1.1(c)(9) of the Sentencing Guidelines, which prescribes an offense level of 26 for offenses involving "[a]t least 100 KG [*i.e.*, kilograms] but less than 400 KG of Marihuana," and on Section 2D1.1(c) n.*, which provides that, "[i]n the case of an offense involving marihuana plants," the sentencing court should "treat each plant as equivalent to 1 KG of marihuana," "if the offense involved (A) 50 or more marihuana plants." Those provisions, in turn, implement 21 U.S.C. 841(b)(1)(B)(vii), which prescribes a five-year mandatory minimum term of imprisonment for convictions under 21 U.S.C. 841(a) that involve "100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight."

Petitioner Helton's criminal history placed him in category IV, with a sentencing range of 92-115 months' imprisonment. He received the minimum prison term of 92 months. Petitioner Powers' criminal history placed him in category I, with a

sentencing range of 63-78 months' imprisonment. He too received the minimum sentence of 63 months.

3. The court of appeals affirmed petitioners' convictions and sentences in an unpublished judgment order. Pet. App. 37-38.

ARGUMENT

Petitioners contend that 21 U.S.C. 841(b)(1)(B)(vii) and its implementing Guidelines provision violate the Due Process Clause because, for offenses involving 50 or more marijuana plants, they irrationally "equate[] one marijuana plant with one kilogram of marijuana." Pet. i. The equation is irrational, petitioners argue, because one marijuana plant yields much less than one kilogram of marijuana, Pet. 25-26, and because Congress did not use the same equivalency approach for other controlled substances harvested from plants, Pet. 15, 21-22. Those arguments lack merit.

"All six courts of appeals that have confronted the issue have rejected a constitutional challenge to the one plant/one kilogram equivalence" in 21 U.S.C. 841(b) and Sentencing Guidelines § 2D1.1(c). *United States* v. *Underwood*, 970 F.2d 1336, 1339 (4th Cir. 1992) (per curiam). Those courts have properly rejected the argument, renewed here, that the provisions are irrational because a marijuana plant does not yield one kilogram of consumable or marketable marijuana. As the Seventh Circuit recognized, "[t]here is no correlation to weight or yield because that was not the basis of Congress' sentencing scheme." *United States* v. *Webb*, 945 F.2d 967, 968 (1991), cert. denied, 112 S. Ct. 1228 (1992). Instead, the Seventh Circuit went on to explain, the provisions reflect Congress's belief that "the federal govern-

ment's most intense focus ought to be on major traffickers" in illegal drugs; accordingly, after "consulting with a number of DEA agents and prosecutors about the distributions patterns for these various drugs," Congress "selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level." *Ibid.* (quoting H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986)). The Ninth Circuit has similarly recognized:

> [Sentencing Guidelines] Section 2D1.1's treatment of marijuana plants does not purport accurately to translate the amount of marijuana harvestable from a given plant. Rather, the section's rationality lies in its recognition of a higher level of culpability for marijuana growers compared to those who merely possess the harvested product. Marijuana growers operate at the top of the distribution chain, and are thought an important target for purposes of deterrence.

United States v. *Belden*, 957 F.2d 671, 676, cert. denied, 113 S. Ct. 234 (1992).*

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* Accord *United States* v. *Haynes*, 969 F.2d 569, 571 (7th Cir. 1992) ("The equivalency provision is certainly not based upon a determination that one marijuana plant yields one kilogram of consumable product, for the actual yield is nowhere near that high. * * * Rather, it reflects Congress' judgment that an individual who grows 150 plants is just as culpable as one who has distributed 150 kilograms of marijuana."); *United States* v. *Lee*, 957 F.2d 778, 784 (10th Cir.) (Congress "found a defendant who is growing 100 newly planted marijuana plants to be just as culpable as one who has successfully grown 100 kilograms of marijuana"), cert. denied, 113 S. Ct. 475 (1992); *United States* v. *Osburn*, 955 F.2d 1500, 1507 (11th Cir.) ("[T]he equivalency scheme reflects Congress's

Likewise without merit is petitioners' argument that the equivalency provisions irrationally treat marijuana growers differently from growers of other drug-producing plants. One may readily conceive of plausible reasons why Congress applied the equivalency approach to marijuana growers without adopting a similar approach for growers of other illicit substances. See *Lee*, 957 F.2d at 783-784 (applying rational-basis standard in rejecting due process challenge to equivalency provisions); see also, *e.g.*, *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). For example, Congress could reasonably have determined that marijuana plants are more pervasive and easier to grow in this country than other drug-producing plants, such as poppies, peyote, or coca trees. Cf. 134 Cong. Rec. 24,915 (1988) ("Hawaii has a significant problem with marijuana cultivation.") (statement of Rep. Akaka); *Olsen* v. *DEA*, 878 F.2d 1458, 1467 (D.C. Cir. 1989) (appendix containing final order of DEA stating that "the actual abuse and availability of marijuana in the United States is many times more pervasive * * * than that of peyote"), cert. denied, 495 U.S. 906 (1990). Congress could also reasonably have determined that, in contrast to other drugs, marijuana is easier and cheaper to grow in this country than it is to import.

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beliefs concerning the seriousness of the crime [of growing marijuana], not the actual or potential weight of the plant."), certs. denied, 113 S. Ct. 223 and 113 S. Ct. 290 (1992). Although petitioners rely (Pet. 17) on the district court decisions in *Osburn* and *Lee*, those decisions were reversed in the courts of appeals.

Either of those determinations justifies Congress's focus on marijuana growers.

Finally, as petitioners observe (Pet. 7), the issues raised in this case are "identical" to those raised in the petition for a writ of certiorari to review *United States* v. *Osburn*, 955 F.2d 1500 (11th Cir. 1992). Indeed, petitioners "request that the[ir petition] for Certiorari * * * be joined with" the petition in *Osburn*. Pet. 7. This Court recently denied certiorari in *Osburn*, 113 S. Ct. 223 and 113 S. Ct. 290 (1992), and should likewise deny certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

DAVID S. KRIS
Attorney

DECEMBER 1992